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No. 80-2066

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNIVERSITY OF PITTSBURGH, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's order enforcing the Commission's subpoena, which requested certain information concerning the sex, salary, job responsibilities, and required qualifications of faculty members in four of the University's fifteen professional schools.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported. The opinion of the district court (Pet. App. 12a-27a) is reported at 487 F. Supp. 1071.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1981. The petition for a writ of certiorari was filed on June 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1977, a charge of sex discrimination was filed with the Commission on behalf of 29 present and former faculty members of the School of Nursing of the University of Pittsburgh. The charge alleged that "[t]he University of Pittsburgh has discriminated, and is still discriminating,

against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 2a n.1).[1]

2. The Commission began its investigation of this charge by requesting that petitioner provide certain information concerning the sex, salary levels, experience, and job responsibilities of faculty members in four of the 15 professional schools at its Pittsburgh campus: Health Related Professions, Nursing, Pharmacy, and Social Work (Pet. App. 3a).[2] On August 1, 1978, after petitioner had refused to provide this information voluntarily, a subpoena duces tecum was issued by the Commission (*id.* at 3a-4a n.2). Thereafter, in November 1979, the Commission sought enforcement of this subpoena in the United States District

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[1]The charge, which was filed by Margaret I. Carroll, acting director of the American Nurses Association, alleged that (Pet. App. 2a-3a n.1):

> The University of Pittsburgh has discriminated, and is still discriminating, against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees. Thus, the discrimination is based upon sex. Consequently, this action of the University of Pittsburgh amounts to an unlawful employment practice, and as such, is prohibited by the provisions of Title VII of the Civil Rights Act of 1964 as amended. Inasmuch as several fringe benefits are based upon or linked with salary, by paying women faculty employees lower monthly salaries than the ones paid to male faculty employees, the University of Pittsburgh is also guilty of committing an unlawful employment practice over other conditions of employment. This, too, constitutes discrimination based upon sex and is therefore prohibited by provisions of Title VII of the U.S. Civil Rights Act of 1964 as amended.

[2]The University had previously declined to participate in settlement discussions prior to the Commission's undertaking of a formal investigation and reasonable cause determination (Pet. App. 13a).

Court for the Western District of Pennsylvania under Section 710 of Title VII, 42 U.S.C. 2000e-9 (Pet. App. 4a).[3] On January 16, 1980, petitioner filed an answer and counterclaim in which it asserted that it was not legally required to produce any of the information requested by the subpoena (*id.* at 15a).

3. On March 26, 1980, following a full evidentiary hearing on the Commission's subpoena enforcement application, the district court found that the subpoena should be enforced under *United States* v. *Powell*, 379 U.S. 48 (1964), because the Commission's investigation was within its authority, the subpoena was not too indefinite, and the information sought was relevant to the charge under investigation (Pet. App. 16a-27a). Specifically, the court rejected petitioner's claim that information concerning the faculty of the four professional schools was not relevant to the Commission's investigation of the sex discrimination charge filed on behalf of the female members of the nursing faculty, noting that the very language of the charge showed that "the charge here is not restricted to the School of Nursing, but its dimensions are University-wide" (*id.* at 22a). Further, the court found that "the entire faculty in the

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[3]The Commission's application for enforcement of the subpoena included the affidavit of the district director who issued the subpoena, as well as the Commission's final determination denying the University's petition for revocation of the subpoena. The Commission's determination stated (Br. in Opp. 4):

> [T]he information requested * * *, especially as to sex and job descriptions, will demonstrate the employment patterns and practices of the [University] and may support the Charging Party's claim of discrimination if, for example, it should develop that women instructors and professors performing similar duties are paid lower salaries than male instructors and professors. Salary comparisons may also be necessary for the purpose of fashioning relief. All of the material sought will provide comparative evidence which is probative and necessary to the resolution of Title VII cases.

School of Nursing is female and information beyond [that school] may be crucial to the EEOC's determination of probable cause" (*id.* at 21a).[4] The court also agreed with the Commission's contention that the question whether salary and related " 'information pertaining to one school may aid in an investigation of another school is a matter which cannot be determined until the information is examined' " (*ibid.*).[5]

4. The court of appeals affirmed, holding that the Commission had satisfied the requirements for enforcement of an administrative subpoena under *United States* v. *Powell*, 379 U.S. 48 (1964). First, the court found that the information required by the subpoena was relevant to the charge under investigation because "such information may provide a useful context for evaluating the practices under investigation" (Pet. App. 6a). Second, the court found that the information that the Commission sought was "not indefinite, but limited to the practices of four related schools within the University" (*id.* at 6a-7a). Finally, the court noted that "because the School of Nursing faculty is almost

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[4]The district court also rejected petitioner's contention that enforcement of the subpoena should be denied because the information sought was "confidential" (Pet. App. 24a-25a). Likewise, the court rejected (*id.* at 25a-27a) petitioner's argument (in connection with its counterclaim for injunctive and declaratory relief) "that regulations promulgated by the EEOC permitting disclosure of information obtained during the course of an investigation are void and unenforceable."

[5]Contrary to petitioner's assertion (Pet. 4-5), the Commission's investigator explained at the evidentiary hearing in the district court the basis upon which the four schools had been chosen. He stated (R. 58a):

> [W]hen we originally picked them, we decided we would question the charging parties—the aggrieved parties—and find out which ones may be similar to the School of Nursing as far as health-related professions. But we were not going to confine it to that, but what we wanted to do at that point was just to get a sampling of the comparison groups, males and females, in each school. We did not want it to be burdensome.

totally female, examination of other schools is crucial for any investigation of gender based discrimination" (*id.* at 7a).[6]

ARGUMENT

The courts below correctly held that the Commission's subpoena should be enforced because it requested information that was relevant to the charge under investigation, which alleged discrimination "against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees" (Pet. App. 2a n.1), and otherwise satisfied the requirements for enforcement of an administrative subpoena. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, and further review is therefore unwarranted.

1. Petitioner contends (Pet. 9) that information concerning faculty positions in schools other than the School of Nursing is irrelevant because "academicians with different professional backgrounds, training and experience are neither similar to nor comparable to one another." Petitioner's contention is not well-founded, however, because it ignores the scope of the charge, which alleges University-wide sex-based wage discrimination. Moreover, the Commission necessarily must examine such information before it can determine whether there is reason to believe that petitioner discriminates against women faculty members as a general matter. See *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980). Here, the Commission properly chose to begin its investigation by examining data from the School of Nursing (with respect to which the charging party had direct knowledge) and three related schools.

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[6]The court of appeals also held that the district court had correctly concluded that the Commission "did not possess the requested information" (Pet. App. 7a). Likewise, the court of appeals upheld the district court's finding that the Commission had followed "all the procedural steps mandated by statute" and regulations (*id.* at 7a-8a).

2. Even if the charge had been limited to the School of Nursing, however, the scope of the Commission's subpoena would have been proper.[7] The courts of appeals have recognized that the Commission's investigatory powers are broad, and its investigation is not limited to those claims advanced by a charging party. See, *e.g.*, *Motorola, Inc.* v. *McLain*, 484 F. 2d 1339, 1342 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974); *New Orleans Public Service, Inc.* v. *Brown*, 507 F. 2d 160 (5th Cir. 1975); *EEOC* v. *University of New Mexico*, 504 F. 2d 1296 (10th Cir. 1974). See also *General Telephone Co.* v. *EEOC, supra*, 446 U.S. at 331.

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[7]Petitioner's contention (Pet. 10) that information concerning faculty positions in other schools of the University is irrelevant as a matter of law is insubstantial in light of *County of Washington* v. *Gunther*, No. 80-429 (June 8, 1981), in which the Court held that the Bennett Amendment of Title VII, 42 U.S.C. 2000e-2(h), does not limit Title VII's prohibition of sex-based discrimination to those practices that would also violate the "equal pay" standard of the Equal Pay Act of 1963, 29 U.S.C. 206(d). Even if petitioner is correct in its assertion that faculty positions in other schools are not "equal" to those of the School of Nursing, the subpoenaed information may be relevant in determining whether a pattern of sex-based discrimination exists. Especially in light of the virtually all-female character of the School of Nursing faculty, sex-based wage disparities in other schools of the University (if not explained by factors other than sex) may well constitute probative evidence of discrimination. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-580 (1978). Cf. *Sweeney* v. *Board of Trustees of Keene State College*, 569 F. 2d 169, 179 (1st Cir.), vacated and remanded on other grounds, 439 U.S. 24 (1978) (average salaries of male and female faculty established pattern of sex discrimination in compensation, but insufficient evidence was presented to determine to what extent other factors contributed to plaintiff's compensation). The relevance of such information is particularly obvious where, as here, the record suggests that salary determinations are the result of a centralized decision-making process. Contrary to petitioner's representation (Pet. 17 n.10), the Dean of the School of Social Work testified that petitioner's central administration is ultimately responsible for approving all faculty salaries, that there are general University-wide salary, promotion, and tenure guidelines, and that all University faculty must satisfy general University-wide publication, teaching, and practical work requirements (R. 116a-122a, 124a, 127a-130a, 132a).

The courts have thus routinely upheld Commission subpoenas seeking information with respect to job classifications, departments, and employment practices other than those directly implicated in the charge. See, *e.g.*, *EEOC* v. *Cambridge Tile Manufacturing Co.*, 590 F. 2d 205, 206 (6th Cir. 1979) (information concerning sex discrimination in job classification relevant to charges of sex and race discrimination in firing); *EEOC* v. *University of New Mexico, supra*, 504 F. 2d at 1299-1302 (information concerning all faculty members in college of engineering relevant to individual charge of retaliatory discharge).[8] The information requested by the subpoena, which concerns not only salaries of male and female professors, but also job functions, requirements, and qualifications, is plainly relevant and essential to the determination that the Commission is required to make.[9]

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[8]The decisions upon which petitioner relies (Pet. 11-12) do not demonstrate the existence of any conflict warranting review. Petitioner points to several decisions (see *ibid.*) that have limited Commission subpoenas, but those decisions involved only very narrow individual charges, rather than allegations of facility-wide discrimination, such as those at issue here. By contrast, those cases enforcing broad Commission subpoenas (see Pet. 12) involved charges of facility-wide discriminatory practices, such as the charge at issue here.

[9]Petitioner's reliance (Pet. 10) on *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), and *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605 (1974), is misplaced because those cases involve the weight to be given comparative statistical evidence at trial. Similarly, *Lemons* v. *City and County of Denver*, 620 F. 2d 228 (10th Cir.), cert. denied, No. 80-82 (Oct. 6, 1980), *Keyes* v. *Lenoir Rhyne College*, 552 F. 2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977), and *Christensen* v. *Iowa*, 563 F. 2d 353 (8th Cir. 1977), involve the sufficiency of trial evidence to prove sex-based wage discrimination. None of these cases holds or suggests that information showing sex-based wage disparities is irrelevant to the Commission's inquiry. See also *County of Washington* v. *Gunther*, No. 80-429 (June 8, 1981), slip op. 4 n.8. Because this case concerns only the enforcement of a subpoena issued by the Commission in aid of its investigation, the suggestion of amicus curiae American Council on Education (Br. 7;

3. Petitioner's view (Pet. 9-12) that the Commission must prove at the threshold of its investigation that faculty positions in various schools are "equal," to establish the relevance of the information sought, would create an unbearable burden and deprive the Commission of an opportunity to make a thorough investigation.[10] Petitioner's argument, which would "mean that the Commission, in its investigation, must not ask any questions to which it does not already know the answers, has about it the aura of another, and bygone, legal era" (*Local No. 104, Sheet Metal Workers Int'l Ass'n* v. *EEOC*, 439 F. 2d 237, 241 (9th Cir. 1971)). Indeed, petitioner's view is inconsistent with the very purpose of a subpoena enforcement proceeding: "to discover and procure evidence, not to prove a pending charge or complaint." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201 (1946). See *EEOC* v. *Chrysler Corp.*, 567 F. 2d 754 (8th Cir. 1977). That the information requested here is relevant is clear from the face of the charge. See pages 1-2, 5-7 *supra*. Moreover, the relevance

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emphasis in original) that "[t]he issue presented in this case is whether women who are faculty members in a predominantly female professional school can establish sex discrimination *solely* by comparing their salaries to those paid to men on the faculties of other separate and distinct professional schools" is well wide of the mark.

[10]Contrary to petitioner's contention (Pet. 15, 18), this case does not present the question whether the requirements set forth in *United States* v. *Powell*, 379 U.S. 48 (1964), apply to Commission subpoena enforcement proceedings. It is well established that the *Powell* requirements apply generally to administrative subpoena enforcement proceedings, and both courts below applied these requirements (see Pet. App. 5a, 18a-19a). At all events, petitioner challenges only the relevance of the information sought, a question that was properly decided by both courts below.

Likewise, the appropriate standard of review is not at issue because the court of appeals determined both that the district court's finding of relevance was not clearly erroneous and that the district court's decision was in accord with established legal standards (see Pet. App. 6a-7a).

of the information was further confirmed both by the affidavit of the district director who issued the subpoena and by the final determination of the Commission with respect to the University's revocation petition. Both of these documents set forth the relationship between the information sought and the Commission's investigation of the charge of University-wide sex discrimination. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 637, 653 (1950); *Oklahoma Press Publishing Co.* v. *Walling, supra*, 327 U.S. at 190 nn.2 & 3, 191, 214-216. The Commission was not required to come forward with any additional evidence.[11]

4. Finally, petitioner's concern (Pet. 19-20) that compliance may result in public disclosure of salary information is unfounded. The court of appeals held that such information may be disclosed only to the charging party and her attorney, and, pursuant to this Court's decision in *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981) slip op. 7 (footnote omitted), only after the charging party has "execute[d] a written agreement not to disclose the information to any other person, except as part of the normal course of litigation after a suit is filed." Similarly, the fact that petitioner may consider the subpoenaed salary information to be sensitive or confidential provides no basis for denying the Commission the information necessary to investigate alleged violations of the law. See *Couch* v. *United States*, 409 U.S. 322, 335-336 & n.19 (1973); *United States* v. *Miller*, 425 U.S. 435, 445-446 & n.8 (1976).

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[11]The courts, including the Third Circuit, have consistently held that the government may establish relevance by petition and affidavit (*United States* v. *Garden State National Bank*, 607 F. 2d 61 (3d Cir. 1979); *United States* v. *Davis*, 636 F. 2d 1028 (5th Cir. 1981)), and this Court has recognized that district courts may, in appropriate circumstances, enforce agency subpoenas without providing a full hearing (*CAB* v. *Hermann*, 353 U.S. 322 (1957)). Here, a hearing was held, and petitioner was provided a full opportunity to show why the subpoena should not be enforced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

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